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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

---X	
In re:	Chapter 11
LONG ISLAND BANANA CORP., Debtor.	Case No. 8-14-71443-reg
---X	
LONG ISLAND BANANA CORP., Plaintiff v.	
28 WILLIAM ST. CORP., JOHN BALDUCCI JR., JAMES BALDUCCI and CHRISTO CARAMBELES, Defendants.	Adv. Pro. No.14-8119
---X	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION OF DEFENDANTS TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

The Motion to Dismiss (the "Motion") (Adversary Proceeding ECF Docket Numbers 6-7) of Defendants 28 William St Corp. (the "Landlord"), John Balducci Jr. ("John"), James Balducci ("James") and Christos Carambelas ("Christos" and collectively with 28 William St., John and James, the "Defendants") fundamentally misconceive basic federal civil procedure. A motion to dismiss is granted when the plaintiff's complaint, construed in accordance with the Supreme Court's recent guidance in *Twombly*[1] and *Iqbal*[2], *and assuming for purposes of such a motion that plaintiff's allegations are true*, fails to state a claim on which relief may be granted.[3]

Standing those well-established principles on their head, the Defendants ask this Court to resolve in their favor numerous sharp factual disputes contained in the affidavits attached to their Motion and thus dismiss the Complaint, all before discovery or trial, bringing to mind the famous dictum of the Queen in *Alice's Adventures in Wonderland*: "Sentence first -- then the verdict."[4]

The Motion contains a highly detailed factual rebuttal to the Complaint's allegations that relies heavily on four affidavits: a) Affidavit of John Balducci, Jr., dated May 15, 2014; b) Affidavit of John Balducci, Sr., dated May 2, 2014; c) Affidavit of James Balducci, dated May 16, 2014; d) Affidavit of Christos Carambelas, dated May 15, 2014 (the "Defendant Affidavits"). But the fatal flaw of the Motion is that, contrary to long-established law, it asks this Court to determine that the Defendants' version of the facts must prevail. This Court well knows that the

[1] *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544, 577 (2007)
[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[3] Similarly, summary judgment is appropriate where there are no disputed issues of material fact and where the moving party is entitled to judgment as a matter of law. *Celotex Corp. v Catrett*, 477 U.S. 317 (1986); Summary judgment is not appropriate where there are factual issues to be determined. See *Super Nova 330 LLC v. Gazes*, 693 F.3d 138, 144 (2d Cir. 2012) ("Given that the parties' accounts diverge dramatically, the issue of possession could not be decided at summary judgment.") The *Super Nova* case, discussed *infra* also related to the termination of a debtor's interest in leased premises.
[4] Lewis Carroll, *Alice's Adventures in Wonderland*, Chapter XII.

Defendants' invitation must be declined and the Motion denied.

STATEMENT OF FACTS

The Debtor is in the business of purchasing unripened bananas, ripening them for a fee, and selling and transporting the ripened bananas to wholesale and retail customers located throughout Nassau and Suffolk counties. The facts are set forth in the Verified Complaint filed April 19, 2014 (the "Complaint") (Adversary Proceeding ECF Docket Number 1) are deemed to be true for the purposes of this proceeding. For brevity, capitalized terms used herein, if not separately defined, shall have the meanings assigned to such terms in the Complaint.

A. Relief Sought

The Complaint seeks a declaratory judgment that: (a) the lease between the Debtor and Landlord dated January 1, 2003 (the "Lease") of commercial space located at 28 William Street, Lynbrook, New York (the "Premises") has not been terminated; and (b) the Lease remains property of the estate and the Debtor has the right to use and occupy the Premises free from Landlord's interference.

The Complaint also seeks damages for (1) amounts due from the Landlord on the basis of an improper attempt at self-help eviction, (2) overpayment of rent, (3) damage to the Debtor's equipment at the Premises, (4) attempts to intimidate the Debtor and chill its efforts to assign the Lease, (5) unfair competition, and 6) attempts to stifle the Debtor's efforts to reorganize and emerge from Chapter 11.

B. Dispute With the Landlord; Improper Self-Help Eviction

The Complaint and the Motion differ sharply as to whether the Debtor has a valid tenancy under the Lease. As detailed in the Complaint, the Debtor's position is that the Rent Notice delivered by the Landlord was defective because it failed to comply with terms of the

Lease and that the Debtor never surrendered the Lease. The Debtor further contends that the Landlord's self-help eviction was unauthorized and unlawful. The Landlord's version is that its notice was proper, that the eviction was valid, and that even if those actions were defective, the actions of Wendy Hoey validly surrendered the Premises and terminated the Lease.

As the Court can see, the Complaint and the facts alleged in the Motion presents starkly inconsistent factual narratives, from which different legal consequences flow. The Debtor's argument, as illustrated again by this dispute, is that for purposes of a motion to dismiss, the Court must accept the plaintiff's allegations as true and dismiss the Complaint only if there are no facts that would entitle the plaintiff to recover. But here the plaintiff Debtor has pled facts with a high degree of particularity, that, if established at trial, will entitle it to recover. For that reason, the Defendants' Motion with respect to the Lease termination and the surrender dispute must be denied.

C. The Debtor Materially Overpaid Taxes Under the Lease

The Complaint pleads that the Lease requires that the Debtor pay to the Landlord the amount by which real estate taxes ("Real Estate Taxes") increased over the level existing in 2002-3 (the "Base Year Taxes").The Debtor contends it was improperly billed for, and paid without knowledge of being so overbilled, the total tax bills relating to the Premises, inclusive of the Base Year Taxes, directly to the taxing authorities. The Debtor alleges the total amount it was overbilled and overpaid exceeds $800,000.

In the Motion, Defendants urge that the Debtor was not overcharged for taxes, and that the Debtor is relying on an incorrect version of the Lease, a contention the Debtor disputes. It is clear that resolving this dispute requires this Court to determine which version of the Lease is correct. But what the Court cannot properly do on a motion to dismiss is determine that

Defendants' version is correct and thus resolve this factual dispute in their favor

D. Defendants Wrongfully Set Up A Competing Business

The Complaint alleges that the Landlord is engaged in a continuing effort to usurp the Debtor's going concern value and goodwill. The Complaint further alleges that the Landlord, in combination with the other Defendants, has set up a business to compete with the Debtor using the Debtor's trade secrets and other proprietary information that it wrongfully obtained while in possession of the Premises. The Complaint further alleges Defendants' misconduct in attempting to thwart and interfere with the Debtor's reorganization efforts by seeking to intimidate and harass potential investors in the Debtor's business.

Defendants' arguments with respect to these claims are nothing more than strenuously voiced denials of the Debtor's factual allegations. But shouting from the rooftops is not a successful strategy for a motion to dismiss. In no way do Defendants analyze the substance of the Debtor's allegations for the purposes of arguing whether the Debtor could prevail on its claims if proven. Instead, Defendants repeat their error of attempting to persuade this Court that their factual contentions are correct and that the Debtor's must be rejected.

ARGUMENT

Defendants have not met their burden of establishing that the Debtor is not entitled to relief under any set of facts that could plausibly be proven under the Complaint. Accordingly, Defendants' Motion to Dismiss pursuant to Fed.R.Civ.P. Rule 12(b)(6) as incorporated by Fed. R. Bankr. P. 7012 ("Rule 7012"), must be denied.[5]

In considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, a court must accept as true all factual statements alleged in the complaint, see *Ashcroft v. Iqbal*, 556 U.S. 662, 67 (2009). The allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Under Fed. R. Civ. P. 8(a)(2), a pleading need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A pleading does not need "detailed factual allegations", *Twombly*, 550 U.S. at 555, but does need "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 citing *Twombly*, 550 U.S. at 555.

Allegations contained in the complaint are to be construed in a light most favorable to the plaintiff. See *LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir.1991); *Eisenberg v. Feiner (In re Ahead By a Length, Inc.)*, 100 B.R. 157, 162 (Bankr. S.D.N.Y.1989) (citing *Scheuer*, 416 U.S. at 236, 94 S.Ct. 1683). However, courts are free to disregard legal conclusions, deductions or opinions couched as factual allegations." *Securities Investor Protection Corporation v. Stratton Oakmont, Inc.*, 234 B.R. 293 (Bankr. S.D.N.Y. 1999).

[5] Alternatively, if the Motion is granted, the order should grant leave to replead.

POINT I

THE MOTION TO DISMISS RELIES HEAVILY ON CONTESTED FACTUAL ALLLEGATIONS

The Motion to Dismiss relies heavily on the Defendant Affidavits, which set up factual disputes with the allegations pled in the Complaint. A motion to dismiss is not the appropriate place to determine factual issues. See, e.g. *E.S. Originals Inc. v. Totes Isotoner Corp.*, 734 F. Supp. 2d 523, 528 (S.D.N.Y. 2010) ("[A] disputed issue of fact ... is inappropriate to consider in the context of a Rule 12(b)(6) motion." *DiBlasio v. Novello*, 344 F.3d 292, 304 (2d Cir.2003). The facts recited in the Complaint and in the Defendant Affidavits are ships passing in the night; there are stark differences over, *inter alia*, the following issues:

1) Which version of the Lease governs the relationship between the Debtor and the Landlord;

2) Whether Wendy Hoey, the brother of the Debtor's principal Thomas Hoey Jr., had authority to surrender the Premises to the Landlord; and

3) Whether the Landlord and its allies engaged in actionable conduct vis a vis the Debtor.

A. The Correct Version Of The Lease Is Disputed

The first dispute is which version of the Lease is in effect. In three previous court filings, the Landlord attached to its papers a version of the Lease (the "Original Lease") containing the following language in Paragraph 33:

> 33. Real Estate Taxes. The Tenant covenants and agrees to pay any and all increases in the real estate taxes (including, but not limited to School and Town Taxes) assessed and levied against the Demised Premises .above the taxes for 2002/2003 School Tax: and the 2003 Town Tax:. Payments shall be made in equal monthly payments of one-twelfth (1/12th) of the annual increase. Landlord shall give Tenant notice of such increase in January of each year: The money due for payment of taxes shall be deemed additional rent payments and can be enforced in the (page break here but text flows smoothly) same manner as allowed herein of the collection of rent. As of the date of this Lease; the yearly taxes for the entire Demised Premises are as

> follows: $10,810.04 for the general tax, $51,720.00 for the school taxes and $21,742.00 for the village taxes.

Under the Original Lease the Debtor was liable only for the Tax Escalation.

On April 19, 2014 the Debtor commenced this Adversary Proceeding, relying upon the accuracy of the Original Lease. On April 30, 2014 the Landlord filed a "corrected" version of the Lease (the "Revised Lease") (ECF Docket No. 73). The Original Lease and the Revised Leases are identical, except for Paragraph 33, and provides for the Debtor to pay all such taxes:

> 33. Real Estate Taxes The Tenant covenants and agrees to pay taxes and all increases in the real estate taxes (including but, not limited to School and Town Taxes) assessed and levied against the Demised Premises above the taxes for 2002/2003 School Tax and the 2003 Town Tax. Payments shall be made in equal monthly payments of one-twelfth (1/12th) of the annual increase. Landlord shall give Tenant notice of such increase in January of each year.
>
> The money due for payment of base taxes shall be deemed additional rent payments and can be enforced in the same manner as allowed herein of the collection of rent. As of the date of this Lease, the yearly taxes for the entire Demised Premises are as follows: $10,810.04 for the general tax, $51,720.00 for the school taxes and $21,742.00 for the village taxes.

John Balducci Jr. seeks to explain the differences between the two versions in his affidavit. In asking this Court to deny the Motion, the Debtor calls to this Court's attention this factual dispute and relies on the settled rule that a motion to dismiss is not the appropriate forum for determining which version of the Lease governs.

B. The Parties Dispute Whether The Premises Were Surrendered

The well-pled allegations of the Complaint assert that Wendy Hoey was an employee of the Debtor with no authority to surrender the Premises. The Complaint further pleads that the Debtor obtained the entry of the February 26, 2014 Order to Show Cause to be restored to the Premises and that such relief was granted. This relief was modified but not rescinded in the April 2, 2014 Order to Show Cause. Relying on the Defendant Affidavits, the Defendants make myriad factual arguments for their contention that the Lease was surrendered by Ms. Hoey or otherwise. But this Court cannot determine the issues concerning authority or lack thereof, or indeed what transpired, based upon disputed factual allegations.

C. The Parties Dispute Whether The Landlord Otherwise Engaged In Actionable Conduct Against The Debtor

The Complaint alleges that the Landlord and other defendants engaged in unlawful conduct vis a vis the Debtor prior and subsequent to its exercise of self-help. Among the actions that the Complaint alleges are:

a) The Landlord's principals organized a corporation with a name similar to the Debtor;

b) The Landlord's principals hired many of the Debtor's ex-employees;

c) The Landlord's principals engaged in industrial espionage against the Debtor's operations; and

d) The Landlord sought to intimidate the Debtor's contemplated funder in going forward with aiding the Debtor's reorganization.

The Defendants deny their actions and their legal import through the Motion and the Defendant Affidavits. The Court cannot determine any of these issues based on the Motion. Rather, a discovery record needs to be established; perhaps after that time the issues will be ripe for summary judgment. But what is clear is that on the basis of the Motion and the Defendant Affidavits, the Motion must be denied.

POINT II

THE DEBTOR'S TENANCY WAS NOT TERMINATED PREPETITION

The First Claim for Relief seeks a determination that the Lease was in full force and effect as of the Filing Date. The Debtor has adequately pled that the Landlord did not terminate the Lease in any manner recognized by contract or New York law.

There are four ways that a lease can terminate: 1) passage of the expiration date on the lease; 2) issuance of a warrant of eviction; 3) termination by properly served notice fixing an early termination date for the lease, based upon expiration of a cure period and failure to cure or obtain a stay of the cure period; or 4) surrender by the tenant. Because none of these events have happened, the Lease is in full force and effect.

The Landlord does not contend that the Lease expired in accordance with its terms. Nor does the Landlord argue that it has obtained a warrant of eviction. Thus, the Landlord can only prevail by demonstrating that it served a proper notice that had the self-executing effect of terminating the Lease on a date certain, or that the Debtor voluntarily surrendered the Premises. The Landlord cannot prevail upon either ground.

A. The Landlord Did Not Terminate The Lease By Creating A Condition Subsequent

The Landlord relies upon its service of the Rent Notice for its termination of the Lease. Notices and contractual agreements are strictly construed to avoid forfeitures. See, e.g. *Columbia Ry., Gas & Elec. Co. v. State of S. Carolina*, 261 U.S. 236, 248, 43 S. Ct. 306, 309, 67 L. Ed. 629 (U.S.S.C. 1923) ("We begin the inquiry with the general rule before us that 'conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are construed strictly….").

Under New York law, the notice must provide that the time expires automatically and without further action by the Landlord. See, e.g. *In re St. Casimir Development. Corp.*, 358 B.R. 24, 38 (S.D.N.Y. 2007) ("Generally speaking, if a clause in a contract provides that the contract will end at the moment a particular designated event happens, that clause creates a conditional limitation. Upon the occurrence of the contingency, the contract automatically expires; it cannot be resurrected by action of the parties.); *TSS-Seedman's, Inc. v. Elota Realty Co.*, 72 N.Y.2d 1024, 1026, 531 N.E.2d 646, 647 (1988) ("The termination clauses in the leases were conditional limitations. As such they provided that if a notice of default were sent, the leases would automatically expire on the happening of a specified contingency, the arrival of the termination date fixed in the notice"). The *St. Casimir* court gave an example of a lease provision enabling a landlord to terminate a lease by way of creating a conditional limitation:

> The classic New York example is found in commercial landlord-tenant law, when a lease provides as follows:
>
> > In the event of a breach the landlord, may, if the landlord so elects terminate the lease by giving five days' notice in writing of its intention to do so and this lease and the term hereof shall expire and come to an end on the date fixed in such notice as if the said date were the date originally fixed in this lease for the expiration hereof.

> *Perrotta v. Western Regional Off–Track Betting Corp.,* 98 A.D.2d 1, 469 N.Y.S.2d 504, 506 (4th Dep't 1983). Once the five days' notice is sent, the lease automatically expires at the end of the fifth day, unless one of three things happens: the landlord withdraws the notice; the parties agree to toll the running of the five day period; or a court intervenes and enjoins the running of the five days.
>
> *In re St. Casimir Dev. Corp.,* 358 B.R. 24, 38-39 (S.D.N.Y. 2007).

Paragraph Seventeenth of the Lease provides the Landlord's right of self-help if the Landlord serves a cure notice ("Notice to Cure") specifying the alleged defaults and the expiration of ten days without cure of the alleged violation, and states in relevant part as follows:

> In case of violation by the Tenant of any of the covenants, agreements and conditions of this lease, or of the rules and regulations now or hereafter to be reasonably established by the Landlord, and upon the failure to discontinue such violation **within ten days after notice thereof given to the Tenant**, this lease shall thenceforth, at the option of the Landlord, become null and void, and the Landlord may re-enter without further notice or demand (emphasis supplied).

The Rent Notice provided five and not ten days notice, and was not served in accordance with the notice provisions of the Rider.

The Landlord's failure to serve this notice properly renders it invalid. See, e.g. *St. Casimir, Id.* at 41 ("New York law requires parties to strictly comply with a contract's notice provisions. See *Dale*, 571 N.Y.S.2d at 186. Because the Removal Letter was not sent to the proper parties, it is void and of no effect."); See also *Dale v. Industrial Ceramics, Inc.*, 150 Misc. 2d 935, 571 N.Y.S.2d 185 (Sup. Ct., N.Y. County 1991).Thus, the improper amount of time set forth in the Rent Notice and the failure to serve it correctly is fatal to its effectiveness.

The Rent Notice also gave the Landlord the option of determining that the Lease was "null and void." The fact that the Landlord had the option to terminate the Lease rather than the termination being self-executing renders the Rent Notice futile. See, e.g. *St. Casimir, Id.*at 39 ("

By contrast, where a party has the option either to terminate the contract upon the occurrence of an event or not to terminate—and where the contract does not expire by its own limitation upon such occurrence—then the contract contains a condition subsequent. Under a condition subsequent, termination of the contract is not "self-executing" when some triggering even occurs; rather, the person who wishes to terminate the contract must perform some additional act in order to terminate the contract."). See also *In re Heath Global, Inc.*, 492 B.R. 650, 659 (S.D.N.Y. 2013) reh'g denied, 12 CIV. 8966 (RA), 2013 WL 6722773 (S.D.N.Y. Oct. 9, 2013). The Lease gave the Landlord the option to take the further step of deeming the Lease "null and void," thus giving the Landlord the power to create a condition subsequent. The Rent Notice did not state that the Lease was "null and void" at the end of any particular time period. Thus, the Rent Notice did not terminate the Lease, and the exercise of self-help on February 21, 2014 did not succeed in altering either the Lease or the Rent Notice purportedly issued under its terms.

B. The Debtor Did not Voluntarily Surrender The Premises

The Landlord argues that the Debtor voluntarily surrendered the Premises. According to the Defendant Affidavits, the Landlord dealt only with Wendy Hoey, who is the wife of the Debtor's principal. She is not an officer or director of the Debtor. The Landlord argues that because Wendy Hoey did not obstruct the Debtor's removal from the Premises, Wendy Hoey consented on behalf of the Debtor to removal. Under New York law, an agent cannot create apparent authority; only the principal can. See, e.g. *Hallock v. State*, 64 N.Y.2d 224, 231, 474 N.E.2d 1178, 1181 (1984) ("Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority."); *Network Management Services Group, Inc. v. Rosenkrantz*

Lyon & Ross, Inc., 211 A.D.2d 584, 585, 622 N.Y.S.2d 511, 512 (A.D. 1 Dept. 1995) ("Plaintiff's claim that Manchester was cloaked with apparent authority fails because all of the documents relied upon by the plaintiff as the basis for its reasonable belief, including the Underwriting Agreement, the Prospectus, and the unsigned Agreement Among Underwriters, were created by Manchester, which cannot, by its own acts, imbue itself with apparent authority to act as an agent on behalf of the moving defendants.").

Wendy Hoey did not display a power of attorney giving her authority to act for the Debtor, nor did the Landlord request evidence of such authority. Thus, Wendy Hoey could not bind the Debtor by surrendering the Lease. Under the terms of the Lease, the Lease could only be surrendered and its surrender accepted in writing. Paragraph 49 of the Rider states as follows:

> 49. No act of the Landlord, its employees or anyone acting on behalf of the Landlord, including, but not limited to the acceptance of a key, shall be deemed an acceptance of Tenant's surrender of the premises unless such acceptance of Tenant's surrender of the premises is in writing and signed by the Landlord.

The following facts are undisputed: The Debtor did not surrender the keys to the Landlord. The Debtor did not execute or deliver any written acknowledgement that it was surrendering the Lease to the Landlord. The Landlord did not execute or deliver any written acknowledgement to the Debtor that it was accepting surrender of the Premises and the termination of the Lease. Thus, the Lease was never voluntarily surrendered by the Debtor.

C. Possession of the Premises Makes the Lease Assumable by the Debtor

Under New York Law, "it is the execution, and not the issuance, of the warrant of eviction that extinguishes the tenant's interest in a lease, until the warrant is executed, the lease is "unexpired" for purposes of Section 365(d)(3)." *Super Nova, Id.at* 145 (2d Cir. 2012). The *Super Nova* Court "therefore vacate(d) the District Court's judgment that the lease in this case was not "unexpired" under Section 365(d)(3)." Under the *Super Nova* holding, the Court should determine, after hearing evidence, whether the Lease was in fact terminated. This cannot be decided on a motion to dismiss.

POINT III

THE DEBTOR HAS ADEQUATELY PLED ITS CLAIM FOR OVERPAYMENT OF TAXES

The Debtor seeks recovery of overpaid real estate taxes in the Second Claim for Relief and requests for a declaration as to the Cure Amount in the Third Claim for Relief. Adjudication of this claim on a motion to dismiss turns on the Court's determination of which lease is in effect. For purposes of the Motion, the Court must assume the Original Lease is the correct version. Certainly, the Complaint allegation that the Original Lease is the proper version is plausible within the meaning of *Twombly, Id.* and *Iqbal, Id.*

Defendant is judicially estopped from arguing that the Revised Version of the Lease is the correct version. Judicial estoppel bars a party from (i) taking a position that is "clearly inconsistent" with an earlier position, (ii) where the party's former position was accepted by a court in an earlier proceeding, and (iii) where, by taking the position, the party would derive an "unfair advantage" or impose an "unfair detriment" on the opposing party. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); _*Adelphia Recovery Trust v. HSBC Bank USA (In re Adelphia Recovery Trust)*,. 634 F.3d 678, 695-96 (2d Cir. 2011). Notably, because the purpose of judicial estoppel is to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment,'" *Adelphia*, 634 F.3d at 696 (quoting New Hampshire v. Maine, 532 U.S. at 749-50), judicial estoppel applies "not only when [a party] knowingly lies but when it takes a position in the short term knowing that it may be on the verge of taking an inconsistent future action." *Adelphia,* 634 F.3d at 696.[6] Each of the above elements is satisfied here. In this case, the Landlord presented the Original Version of the Lease to the District Court, Nassau County in support of the April 2, 2014 Order to Show Cause and obtained relief. The relief it obtained was an alternative order directing either that the Debtor surrender the Premises, or obtain one delivery of fuel oil to fill its tanks. Now, having succeeded in this endeavor, Defendants ask this Court to rely on the Revised Lease as being the kind of conclusive evidence necessary to dismiss a complaint on summary judgment. This position is simply unfounded in federal practice and is barred by judicial estoppel.

The Landlord's reliance on the voluntary payment doctrine, see, e.g. *Eighty Eight Bleecker Co., LLC v. 88 Bleecker St. Owners, Inc.*, 34 A.D.3d 244, 246, 824 N.Y.S.2d 237, 239 (A.D. 1 Dept. 2006) is mistaken because there the holding turned upon a finding that the tenant was "not laboring under any material mistake of fact…." The determination of whether the Debtor was paying the base rent along with the escalations under a mistake of fact is a determination for the finder of fact to make, not the Court in the context of a motion to dismiss. See, e.g. *Daval Ogden, LLC v. Highbridge House Ogden, LLC,* 103 A.D.3d 422, 423, 961 N.Y.S.2d 33, 34 (A.D. 1 Dept. 2013), construing *88 Bleeker* ("Moreover, plaintiff's claim that the failure to return its first month's rent and security deposit constitutes unjust enrichment is not barred by the voluntary payment doctrine, which requires that plaintiff make the payment at issue without any alleged fraud or mistake (*see Eighty Eight Bleecker Co., LLC v. 88 Bleecker St. Owners, Inc.,* 34 A.D.3d 244, 246, 824 N.Y.S.2d 237 [1st Dept. 2006]). Here, however, plaintiff alleges that it made the payment not knowing that another tenant had a conflicting lease allowing it to continue in the premises.). See also *Samuel v. Time Warner, Inc.*, 10 Misc. 3d 537, 549, 809 N.Y.S.2d 408, 418 (N.Y. Sup. Ct. 2005) ("'However, that common-law doctrine [viz., 'voluntary payment'] only "bars the recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law' *Dillon v. U–A Columbia Cablevision of Westchester, Inc.*, 100 N.Y.2d 525, 526, 760 N.Y.S.2d 726, 790 N.E.2d 1155 [2003], citing *Gimbel Bros. v. Brook Shopping Centers, Inc.*, 118 A.D.2d 532, 535–36, 499 N.Y.S.2d 435 [2d Dept. 1986] "). These are issues of fact, similar to all other issues raised by Defendants in the Motion to Dismiss.

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[6] In determining whether a party may be on the verge of taking an inconsistent position, what matters is not "the subjective intent of the attorney" who makes a representation, but rather "the objective conduct of a party or its counsel." *Adelphia*, 634 F.3d at 696. Significantly, the Landlord discovered the Revised Version of the Lease after it was sued based upon the Original Version.

Thus, whether the Debtor's conduct in paying the base taxes waived its claim for overpayment is a question of fact. The "evidence of the parties' course of conduct", see, e.g. *One Hundred Grand, Inc. v. Chaplin*, 70 A.D.3d 513, 895 N.Y.S.2d 68, 69 (1 Dept. 2010) is relevant where the "leases were ambiguous," *Id.* In this case, the Lease itself was not ambiguous; the version of the Lease asserted by thee Landlord is highly dubious and ambiguous.

Lastly, with regard to the Second and Third Claims for Relief, Defendants argue for "reformation" of the Lease in the context of the Defendant Affidavits. "Under New York law, however, there is a "heavy presumption" that a written agreement accurately reflects the true intention of the parties, see *Id*. at 574, 498 N.Y.S.2d at 347, 489 N.E.2d at 234, and the evidence of mutual mistake upon which Investors relies fails to overcome this presumption of validity." *Investors Ins. Co. of Am. v. Dorinco Reinsurance Co.*, 917 F.2d 100, 105 (2d Cir. 1990). "To reform a contract based on mistake, a plaintiff must establish that the contract was executed under mutual mistake or a unilateral mistake induced by the defendant's fraudulent misrepresentation " *Simek v. Cashin*, 292 A.D.2d 439, 440, 738 N.Y.S.2d 393, 394 (N.Y. App. Div. 2002). See also *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 607 F.

Supp. 2d 600, 604 (S.D.N.Y. 2009) ("a party seeking reformation must "show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties", citing *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 385 N.E.2d 1062 [1978]"). The fact that the rent set under first year of the Lease is not significantly higher than the base year taxes may be a factual issue going to intent; so may the existence of other contracts negotiated in connection with the execution of the Lease. Thus the entitlement of the Debtor to relief in the Second and Third Claims for Relief cannot be determined on a motion to dismiss.

POINT IV

THE COMPLAINT STATES A CAUSE OF ACTION FOR VIOLATION OF TITLE 11 U.S.C. SECTION 363(n)

11 U.S.C. Section 363(n) states as follows:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

The Debtor has pled that Defendants sought to deter Investor from making an investment in the Debtor. The Complaint also alleges that Defendants established a company with a similar name, Northeast Banana Corp., which was formed for the purposes of competing with the Debtor. The Complaint alleges that Defendants sought to intimidate Investor's principal from proceeding with a transaction with the Debtor. The court, in *In re New York Trap Rock Corp.*, 42 F.3d 747 (2d Cir. 1994) overturned the grant, by the bankruptcy court of a summary judgment motion dismissing a request for relief under 11 U.S.C. §363(n) stating:

> The bankruptcy court should not have granted summary judgment to the defendants on this claim. Lone Star had pleaded a viable theory. If Lone Star was chargeable with failure to show evidence that could support the theory, it was surely entitled to discovery before being required to do so.
>
> *In re New York Trap Rock Corp.*, 42 F.3d 747, 753 (2d Cir. 1994)

In *New York Trap Rock* the Court was ruling on an allegation that part of a complex transaction was a payoff to induce a bidder to drop out of budding for a company.

In this case, the fact that Investor has continued to participate in efforts to invest in and finance the Debtor's operations does not mean that Defendants' improper scheme has not succeeded. The transaction between the Debtor and Investor has not yet been consummated, and if it fails to come to fruition, there will be a question of fact as to the cause of its demise.

POINT V

THE COMPLAINT STATES A CAUSE OF ACTION FOR INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE

In order for a Plaintiff to make out a claim for the tort of interference with prospective economic advantage, "a plaintiff must show (1) business relations with a third party; (2) defendants' interference with those business relations; (3) defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the relationship." *Purgess v. Sharrock*, 33 F.3d 134, 141 (2d. Cir.1994); *Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir. 2003). In *Purgess*, the court found that a prior employer that was unresponsive to requests for information about a job-seeker was potentially liable for interference with a prospective economic advantage, as a result of the plaintiff's difficulty in securing employment. This tort "usually involves interference with a business relationship not amounting to a contract." *Volvo North America Corporation v. Men's International Professional Tennis Council,* 857 F.2d 55 (2d. Cir. 1988). In *Volvo,* the court stated further:

> In light of this standard, we believe that the district court erred in dismissing Volvo's claim for tortious interference. Volvo has alleged that MIPTC interfered with Volvo's relations with various parties. Paragraph 89 of the amended complaint, for example, alleges that "the defendants have embarked on a program to persuade or intimidate television networks and tournament owners, producers and directors to interfere with Volvo's reasonable promotional activities in connection with its ownership, production, and sponsorship of various tennis events." ….In our view, these allegations state a claim for relief on the ground of interference with prospective business relations. Although Volvo does not allege any particular contract that was lost as a result of appellees' activities, Volvo does allege the requisite interference for the purpose of harming Volvo. (emphasis supplied).

> *Volvo North America Corporation v. Men's International Professional Tennis Council*, 857 F.2d 55, 74 (2d. Cir. 1988)

The similarities with the case at bar are striking. Here the Debtor alleges that the Defendants sought, through a combination of communications and behavior, to dissuade Investor from investing in the Debtor's business. See Complaint Paragraphs 36 and 37. The Defendants rely on the Defendant Affidavits to seek dismissal.

POINT VI

THE COMPLAINT STATES A CAUSE OF ACTION FOR UNFAIR COMPETITION

Under New York law, unfair competition claims must allege "'the bad faith misappropriation of the labors and expenditures of another, likely to cause confusion or to deceive purchasers as to the origin of the goods.'' *Rosenfeld v. W.B. Saunders, A Division of Harcourt Brace Jovanovich, Inc.*, 728 F.Supp. 236, 249–50 (S.D.N.Y.1990) (quoting *Computer Assocs. Int'l, Inc. v. Computer Automation, Inc.*, 678 F.Supp. 424, 429 (S.D.N.Y.1987)), aff'd, 35 923 F.2d 845 (2d Cir.1990);. *Jeffrey Milstein, Inc. v. Greger, Lawlor*, Roth, Inc., 58 F.3d 27, 34-35 (2d Cir. 1995).

In this case, the Complaint pleads that the Defendants have organized a corporation for the purpose of appropriating the Debtor's existing business. The corporation has a name similar to that of the Debtor. The Defendants have hired or entered into independent contracts with the Debtor's employees and contractors. The Debtor believes that discovery is likely to show a pervasive pattern of misappropriation of the Debtor's intellectual property.

In the context of a motion to dismiss the Court cannot credit the Defendant Affidavits, no matter how strident, asserting factual disagreements with the Debtor's assertions. That is the function of a trial, not a motion to dismiss.

POINT VII

THE DEBTOR HAS ADEQUATELY PLED A CLAIM FOR EQUITABLE SUBORDINATION OF THE LANDLORD'S CLAIMS

The Defendants correctly state the standards for equitable subordination in their papers. Without reference to the Complaint, Defendants rely solely upon the Defendant Affidavits to support their contention that this request for relief, and the entire Complaint, is ripe for dismissal. The fact that the Defendants are vocal in their factual assertions entitles them to no deference.

POINT VIII

THE DEBTOR HAS ADEQUATELY PLED A CLAIM FOR VIOLATION OF THE AUTOMATIC STAY

Notwithstanding the Defendants' *ipse dixit* assertions in their brief that the Defendants did not violate the automatic stay, the Complaint's pleadings are sufficient. There can be no dispute that one of the attorneys was in Court with Debtor's counsel before Judge Spatt on April 4, 2014 and the Court was made aware of the filing. Nevertheless Landlord's counsel proceeded to serve an Order to Show Cause entered in District Court, Nassau County two days earlier. Paragraph 84 of the Complaint alleges:

> As of April 4, 2014, the Landlord was aware of the Chapter 11 filing. On April 4, 2014, an employee or agent of the Landlord (the "Landlord's Agent"), acting on behalf of the Landlord, served the Second Order to Show Cause on the Debtor. During the course of this service, the Landlord's agent employed foul, profane and vulgar language, all as part of the Defendants' continuing attempts to intimidate and harass the Debtor. By virtue of the service of the Second Order to Show Cause and the conduct of the Landlord's agent, the Landlord has violated the automatic stay.

Under these circumstances, the Debtor cannot be expected to have interviewed the agent making the service to learn his name.

CONCLUSION

The Debtor respectfully requests that the Court deny the Defendants' motion in its entirety, or in the alternative allow the filing of an appropriate amended complaint in order to rectify the deficiencies in the Complaint, together with such other and further relief as the Court deems just, proper and equitable under the circumstances.

Dated: May 27, 2014
New York, New York

Respectfully submitted,

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